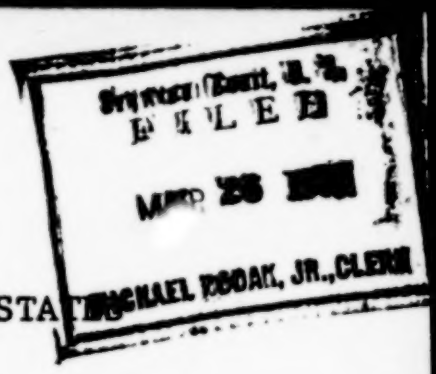

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975
No. 75-5706

CHARLES WILLIAM PROFFITT,
Petitioner,

-vs-

STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Pursuant to Rule 40, Rules of the United States Supreme Court, Respondent will not include in this brief (1) reference to official report of the court below; (2) a jurisdictional statement; (3) a reference to statutes involved in the case; or (4) questions presented for review.

Respondent will include a statement of the case.

STATEMENT OF THE CASE

Respondent, in most instances, accepts the statement of the case contained at pages 9 through 21 of Petitioner's brief.

Primarily, the facts involved are not in dispute, nor of great interest to this Court in determining the questions presented herein. However, Petitioner has raised some doubt as to his mental condition existing at the time of the commission of the crime.

Rule 3.210, Florida Rules of Criminal Procedure, requires that when a defendant intends to rely on the defense in insanity, at the time of the offense, advance notice

of such defense must be given by the defendant. Petitioner at the time of his trial did not place in issue his sanity pursuant to the Florida Rules. The question that Petitioner *might* have been unable to conform his conduct (while under an extreme mental disturbance) to the requirements of law is placed in issue herein by Petitioner by including in the statement of the case portions of the testimony of Dr. James Crumbly, M.D.. Petitioner in his brief makes much of the latter portion of Dr. Crumbly's testimony, while tending to ignore the entire testimony of the doctor. (R 495-505) It should also be noted that the Petitioner, through trial counsel, waived any confidential privilege between the Petitioner and the doctor concerning this examination and the doctor's

testimony (R 497).

It was not until the Petitioner was found guilty and then at the sentencing portion of his trial that this testimony, indicating perhaps some deficiency in the mental capacity of the Petitioner at the time of the crime first was raised. It should also be brought to the Court's attention that upon a doubt being cast upon Petitioner's mental condition at the time of the crime that the trial court, prior to sentencing, directed psychiatric examination of the Petitioner to determine Petitioner's sanity at the time of the crime and at the time of the trial (R 43).

In response to said order, Petitioner was thoroughly examined by qualified psychiatrists and their reports, finding

Petitioner competent to stand trial and at the time of the crime, were filed with the trial court prior to sentencing (R 44) (R 46).

The *total* testimony of the doctor at the sentencing hearing was considered by the jury in reaching its recommendation for the imposition of the death penalty and it was only after the trial court had satisfied itself as to the Petitioner's sanity -- both at the time of the offense and at trial -- that the trial judge followed the jury's recommendation and sentenced Petitioner to death.

Although the issue now before the Court does not require that Respondent argue at great length either the guilt or innocence of Petitioner, Respondent feels it necessary

to comment thereon inasmuch as Petitioner has interposed in his brief the fact that he was perhaps under some type of an extreme mental disturbance. There is not one allegation by the Petitioner now before the Court as to Petitioner's actual trial, and in the absence of such an allegation it can only be considered that from arrest through conviction there is no element for argument. The guilt of Petitioner of the crime charged is without doubt. An examination of the psychiatric reports and medical testimony at sentencing, without argument, prove that Petitioner had a long-standing compulsion to kill, that he did kill, and that Petitioner himself believes that he is capable of killing again.

In the absence of allegations that the statutes of which now Petitioner complains

were improperly applied *sub judice*, it can then only be found that said statutes were properly applied to Petitioner; that there were sufficient aggravating circumstances upon which the jury and the sentencing judge could base the imposition of the death penalty; that the aggravating circumstances when balanced against mitigating circumstances (of which there were none) were properly applied; and that the imposition of the death penalty on Petitioner is a proper sentence in keeping with the offense committed.

SUMMARY OF ARGUMENT

It is obvious from Petitioner's brief as filed that actually two questions are involved. That is (1) whether the imposition of the death penalty is per se vio-

lative of the Constitution of the United States as being a cruel and unusual punishment, and (2) if the imposition of capital punishment is not cruel and unusual within the Constitutional sense, then can a state impose a capital sentence after due process?

Petitioner elects, however, to put the cart before the horse, so to speak, and argues the per se aspect of the Eighth Amendment last in his brief.

Respondent feels, that since the total of all issues now before the Court must first turn on this Court's primary determination as to whether the death penalty is cruel and unusual per se that this issue must, if logical sequence is to be maintained, be disposed of first. Since all

arguments of both Petitioner and Respondent regarding the due process application of the Fourteenth Amendment are bottomed on the assumption that the imposition of the death penalty is not per se cruel and unusual, then argument on this point must follow the disposition of the primary question. Respondent will therefore reverse the order of presentation of the points argued in Petitioner's brief and give argument first to the primary question involved.

Capital punishment is a traditional sanction, recognized as a permissible punishment, for those crimes that society considers the most dangerous.

Capital punishment is expressly referred to in the Fifth Amendment which also provides that no person shall be deprived of

life without due process of law. The Fifth, as well as the Eighth Amendment, which prohibits the infliction of cruel and unusual punishment, were both passed by the same legislative body at the same time, 1789, and was ratified by a vote of the people at the same time, 1791. It would be preposterous to assume that the legislative body drafting these two amendments and the electorate ratifying them could provide for capital crimes in one breath and at the same time provide against cruel and unusual punishment if, in fact, they intended that the infliction of the death penalty (capital crime), as provided in the Fifth Amendment, was a cruel and unusual punishment prohibited in the Eighth Amendment. This Court has, since the inception of these Amendments, and even as of today, refused to

invade these fundamental concepts of the Constitution, but to the contrary has held the imposition of the death penalty not cruel and unusual punishment, *Wilkerson v. Utah*, 99 U.S. 130; *In re Kemmler*, 136 U.S. 436.

Respondent responding to this Court's opinion in *Furman v. Georgia*, 408 U.S. 238, enacted Chapter 72-724, Laws of Florida, re-creating capital punishment in Florida. Respondent contends that this Court *did not* reverse the death penalties imposed by the state courts of Georgia and Texas in *Furman*, supra, on the grounds that the death penalty was per se cruel and unusual punishment, nor did this Court conclude that the death sentences as imposed therein were cruel and unusual as applied to the facts and circumstances of the cases

being considered. This Court's action, Respondent feels, was rather based upon the conclusion that the "system" itself was unconstitutional because it conferred upon juries and/or judges the power to *arbitrarily* and *indiscriminately* sentence a person to death or to life imprisonment and that experience demonstrated juries did so whimsically and freakishly.

Petitioner argues that Florida's new death penalty laws (Ch. 72-724, supra) still permit the same excessive discretionary procedures as condemned by this Court. Respondent submits that the mere presence of discretion in the stages of progression of a criminal trial -- from arrest to final appeal -- are not violative of the due process requirements of the Constitution

or of *Furman*, but it is the quality of a reasoned judgment and the manner in which it is reached and applied that must govern.

Admittedly, Florida's death penalty statute require reasoned judgments be made--both by the jury and the trial judge--in reaching the final decision as to the sentence that will be imposed on a convicted capital felon. A reasoned judgment though must be such as is within the permissible reasonable application of the law, and not outside sound permissible reason or arbitrarily or indiscriminately reached. It must be kept in mind that the reasoned judgment now complained of by Petitioner is the due process required *after conviction* and for the purpose of fixing punishment within permissible limits. The due process

clause imposes some restraint to assure the essential fairness by which discretion is used in fixing a punishment, however, as to require standards of due process, there are necessary and inherent differences between trial procedures and post-conviction procedures, such as sentencing. *Williams v. Oklahoma*, 358 U.S. 576 (1959).

Discretion and judgment are essential to the judicial process and are present at all stages of a criminal trial. The judicial process requires an exercise of reasoned judgment from arrest through arraignment, during trial, in the verdict, and determinatively of the sentence imposed. This judgment will always be present in the appeal of the conviction and sentence. As this Court is now asked to exercise its judgment, likewise, the juries, trial judges,

prosecuting attorneys, and appellate courts--as well as defense counsel--must always exercise judgment and it is not until final conviction whether or not the judgment as exercised will fall within the reasonable bounds of due process. There will never be a criminal trial under our judicial system where reasoned judgment or discretion is not required.

POINT I

CAPITAL PUNISHMENT IS NOT CRUEL AND UNUSUAL PUNISHMENT PER SE AND THEREFORE A LEGISLATURE MAY CONSTITUTIONALLY PROVIDE FOR THE IMPOSITION OF THE DEATH PENALTY.

The Petitioner in the case at bar has elected to rely upon the argument advanced by the petitioner in the case of *Fowler v. North Carolina*, Case No. 73-7031, and directs this Court's attention to pages 102-139 of the brief submitted by the petitioner in said case (Pet. Br., p. 102) to support his contention that the death penalty violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. This being the case, Respondent will address itself to the argument advanced in the brief submitted in *Fowler v. North Carolina*, supra. Wherever Respondent makes a reference to

petitioner's brief under this Point, it will be to the *Fowler* brief.

Respondent notes that Petitioner has conveniently ignored the prior decisions of this Court which have, either explicitly or implicitly, held that capital punishment does not constitute cruel and unusual punishment prohibited by the Eighth Amendment. As Mr. Justice Blackmun noted in *Furman v. Georgia:*

> ". . . This is either the flat or the implicit holding of a unanimous Court in Wilkerson v. Utah, 99 US 130, 134-135, 25 L.Ed 345, 347, in 1878; of a unanimous Court in In re Kemmler, 136 US 436,447, 34 L. Ed 519, 524, 10 S Ct 930, in 1890; of the Court in Weems v United States, 217 US 349, 54 L Ed 793, 30 S Ct 544, in 1910; of all those members of the Court, a majority, who addressed the issue in Louisiana ex rel. Francis v. Resweber, 329 US 459, 463-464, 471-472, 91 L Ed 422, 426, 430, 67 S Ct 374, in 1947; of Mr. Chief Justice Warren, speaking for himself and

> three others (Justices Black, Douglas, and Whittaker) in Trop v. Dulles, 356 US 86, 99, 2 L Ed 2d 630, 641, 78 S Ct 599, in 1958, in the denial of certiorari in Rudolph v Alabama, 375 US 889, 11 L Ed 2d 119, 84 S Ct 155, in 1963 (where, however, Justices Douglas, Brennan, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had 'neither taken nor endangered human life'); and of Mr. Justice Black in McGautha v California, 402 US 183, 226, 28 L Ed 2d 711, 737, 91 S Ct 1454, decided only last Term on May 3, 1971.

Of course, this Court's decision in *Furman* did not hold to the contrary (Burger, C.J., dissenting at 375 and 396) for if it did, the issue would not be presently before the Court in this case.

> The standard of judicial review to be applied is whether there is a rational basis for the legislative judgment.

Petitioner acknowledges that due deference must be given to the legislative

judgments, but then insists that a "uniquely stringent standard of judicial review under the evolving standards of decency that mark the progress of a maturing society" (Pet. Br., p. 107) must be resorted to. Citing to footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938), Petitioner asserts the legislation in question must be subjected to strict judicial scrutiny for the ". . . statutes fall harshly only upon 'discrete and insular minorities' . . . and . . . their operation takes a form that 'restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation. . ." (Pet. Br. at 106-107).

With all due respect to counsel for Petitioner, Respondent suggests that Petitioner in his attempt to shift his heavy

burden of establishing there is no rational basis for the legislative judgment that capital punishment serves a valid governmental interest, *In re Kemmler*, supra; *Trop v. Dulles*, 356 U.S. at 103; *Furman v. Georgia*, 408 U.S. at 451 (Powell, J. dissenting), has improperly relied on the *Carolene Products Co.*, case. Professor Mason has written extensively on the now "famous footnote 4" in his work *The Supreme Court, Palladium of Freedom* (1963), and he makes it quite clear that footnote 4 has no place in this case. In explaining footnote 4, Professor Mason states:

> "The second paragraph suggests that the Court might subject legislation which restricts the *political processes* (limitations on the right to vote, restraints on dissemination of information, interferences with political organization, and prohibitions of peaceable assembly) to 'more exacting judicial scrutiny.' *The underlying rationale is that the political processes can ordinarily*

be expected to bring about repeal of undesirable legislation affecting economic and commercial relations. But interferences such as those just mentioned demand closer judicial notice, because operation of the primary control on government--the political process--is itself impeded.

The third paragraph declares that statutes affecting particular religions or national or racial minorities might also require greater judicial alertness. Since the political protection ordinarily open is unavailable to these *peculiar minorities*, the Court is under the necessity of subjecting such interference to 'more searching judicial inquiry.' Paragraph two does not suggest that greater judicial scrutiny is required by the nature of the rights affected; paragraph three does. *The important consideration is whether judicial intervention is required to safeguard rights inadequately protected by normal political controls.*

It is beyond all doubt that the "more exacting scrutiny" requirements only pertain to those "preferred freedoms" -- speach, thought, religion, assembly and voting or where the legislation affects

particular religions or national or racial minorities, precisely because they are essential to the proper operation of the political processes. Louis Lusky, Justice Stone's law clerk, who according to Professor Mason, originally prepared the draft opinion, explained the footnote was:

> ". . . a frank recognition that the Court feels special responsibility for the protection of the 'political processes,' because, unless some non-political agency intervenes, interferences with the collective mechanism may well perpetuate themselves. The Court thus performs an important part in the maintenance of the basic conditions of just legislation. By preserving the hope that bad laws can and will be changed, the Court preserves the basis for the technique of political obligation, minimizing extra-legal opposition to the government by making it unnecessary. . . . Where the regular corrective processes are interfered with, the Court must remove the interference, where the dislike of minorities renders those processes ineffective to accomplish their underlying purpose of holding out a real hope that unwise laws will be changed, the Court itself step in. . . ."

Louis Lusky, "Minority Rights and the Public Interest", 52 *Yale Law Journal* 1 (1942), 20-21.

Of course, this is why this Court properly intervened in the case of *Baker v. Carr*, 369 U.S. 186 (1962). As Professor Mason observed:

> ". . . With the triumph of Justice Clark's realistic argument for judicial intervention, the American ideal of political equality came a step closer to realization. The Court functioned as an instrument of democracy and of majority rule." *Mason*, at 177.

It is patently clear that the statutes involved in this case in no way restrict the political processes from their normal operation, and Respondent fails to perceive just how they fall upon any discernible or identifiable religious, political or racial minority--save those who might be inclined to commit premeditated murder.

Respondent submits the inquiry must be whether there is a rational basis for the legislative judgment.

The death penalty serves a valid governmental interest.

After noting the traditional objectives which justify the imposition of punishment, to-wit: reformation and rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution and deterrence, Petitioner blandly states without any supporting authority:

> ". . . It is not enough, however, that the death penalty simply implement one or more of these goals. It must be demonstrated that this uniquely harsh punishment is better fitted to the effectuation of the permissible purposes of the criminal law than other kinds of available criminal penalties. . ." (Pet. Br. at 122).

Respondent would point out that nowhere in Petitioner's brief does he tell us

what "available criminal penalties" would be an *acceptable* alternative to capital punishment. Naturally, Respondent assumes Petitioner is speaking of some form of life imprisonment without parole. Respondent submits that the Legislature could validly conclude life imprisonment without parole would not be adequate to deter some individuals from committing homicide in the future.

Amicus for the United States and California in the briefs submitted in *Fowler v. North Carolina* pointed out several cases wherein persons sentenced to life imprisonment subsequently escaped and killed again (Brief of United States at 45; Brief of Calif. at 95-98), and noted that even in a carefully structured prison existence, some individuals are essentially uncontrollable and likely to commit additional

violent offenses that might result in death to other inmates or prison personnel. It is respectfully submitted that in order to make life imprisonment an acceptable alternative to capital punishment for these individuals, society would have to place them in a confinement setting that itself would be cruel and unusual punishment, for they would have to be placed in solitary confinement for the rest of their lives and denied the hope of retreiving any of the incidents of a meaningful existence. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied* 405 U.S. 978 (1972), makes it evident that such treatment is constitutionally unacceptable. In a social order where liberty is cherished more than life itself, it is questionable whether the condemned individual would himself prefer "life" imprisonment over death. Surely the legislative determina-

tion that life imprisonment is not an adequate alternative is not irrational.

Petitioner next asserts that retribution "standing alone" is not a sufficient justification for the death penalty. Interestingly, Petitioner does not deny the concept, he merely asserts it is insufficient "standing alone" to justify resort to the death penalty. Respondent suggests that retribution does *not* stand alone as a basis for the imposition of the death penalty and that Petitioner underestimates its value to society as a whole. Mr. Justice Stewart in his concurring opinion in *Furman v. Georgia*, supra, clearly perceived that:

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal

> offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law." 408 U.S. at 308

This view is supported by others studying the subject. Packer, *The Limits of the Criminal Sanction* (1968); Royal Commission on Capital Punishment, 1949-53 Report (1953); Cohn, *Reason and Law* 50 (1950); Hart, *The Aims of the Criminal Law*, 23 *Law & Contemporary Problems* 401 (1958); *Furman v. Georgia*, 408 U.S. at 453 (Powell, J., dissenting). Respondent would suggest that if society did not use the maximum penalty to express social opposition to those crimes of an extreme nature, society would become desensitized to the gravity of the act. As Professor Goodhart noted:

> "[W]ithout a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's dis-

> approval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime. Goodhart, *English Law and the Moral Law* 93 (1953).

Capital punishment actually reinforces social values in that it stands as a social statement that human life is so sacred that any person who wantonly and without justification takes the life of another shall forfeit his own. As the Solicitor General so properly noted, "retribution" was the only social benefit served by the execution of Nazi leaders for war crimes which they committed and that ". . .[t]hat example alone should warn against the denigration of 'retribution' as a completely legitimate social response to truly heinous crimes. . ." (Brief of United States at 41).

Petitioner next asserts that the "empirical findings" included in their Appendix

". . . conclusively demonstrate, there is no credible evidence--despite the most exhaustive inquiry into the subject--that the death penalty is a deterrent superior to lesser punishments. . . ." (Pet. Br. at 127-128). It is interesting to note that Petitioner does *not* say capital punishment does not deter, he merely states it does not deter more than does life imprisonment. In any event, how Petitioner can make such a statement in the face of that evidence to the contrary is beyond Respondent's comprehension. Mr. Justice Burger quite properly noted that the participants in the debate are caught in an "empirical stalemate", *Furman v. Georgia*, 408 U.S. at 395, and that therefore the ". . . legislatures can and should make an assessment of the deterrent influence of capital punishment, both generally and as affecting the commission of specific types of crimes." 408 U.S. at 403.

Respondent does not wish to belabor this brief with statistical data already before this Court (See: Brief of United States at pps. 32-39; Brief of Calif. at pps. 71-103), but would note that the homicide rate in the United States and the State of Florida has risen at an alarming *rate* since the imposition of the *judicial* monitoriums upon the execution of death sentences.[1]

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[1] The rate of murder per 100,000 inhabitants increased 56% during the period between 1960 and 1970. Federal Bureau of Investigation, Uniform Crime Reports 1970 (August 31, 1971) at 7-8. Since 1970 the rate of murder per 100,000 inhabitants has increased another 32.9%. Federal Bureau of Investigation, Uniform Crime Reports 1864 (November 17, 1975) at 11-16. In Florida in the last five years the rate of murder per 100,000 inhabitants has increased 25.8%. Florida Department of Criminal Law Enforcement, 1974 Annual Report (April 22, 1975). Last year 20,600 people were murdered in the United States and 1,190 were murdered in the State of Florida.

The Royal Commission, after its exhaustive study of this issue, said:

> "The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. *Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment*, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in a just perspective and not base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty." (Emphasis supplied)

Report of the Royal Commission, supra, at 24.

Petitioner argues, however, the violent behavior to which the death penalty is

now exclusively applied is less deterrable than any other human behavior. (Pet. Br. at 129). In other words, persons who commit murder are not "normal" and since only "normal" people are deterred by the death penalty, "murderers" are not deterred! Respondent concedes that the *statutory existence* of the death penalty did not deter those on Death Row. Respondent also concedes that an enforced capital punishment law will not stop murder completely and that it will not deter many who will kill in spite of its existence. Respondent respectfully suggests that there are many "normal" people who *will be* deterred. Indeed, one must only wonder at how many normal people would have been deterred from killing last year alone had it appeared likely that such rash actions would cost them their lives. Perhaps 20,600 persons would not have been murdered in this country

last year. Surely not all of those individuals who killed other human beings last year were not "normal." There is no evidence that Petitioner in this case was not "normal." Indeed, he merely has an uncontrollable urge to kill!

Respondent respectfully urges that the legislature may reasonably draw the inference that over a period of time the existence of the death penalty will *reduce* the commission of the crime of murder and that the absence of such a penalty will have an adverse effect upon the moral standards of society. Cf. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973). In the obscenity cases it was urged that there was no legitimate state interest to be served by the statutes and the empirical findings were as contradictory as the empirical

findings in the instant case. This Court in deference to the legislatures and Congress upheld the statutes on the basis that ". . . [t]he State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . ." 354 U.S. at 502 (Warren, C.J., concurring). Of relevance to the issue presented here is Justice Warren's answer to the dispute among . . . critics, sociologists, psychiatrists, and penologists. . . ." 354 U.S. 501. He said:

> ". . . There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime or delinquency. Others disagree. *Clearly it is not our function to decide this question.* That function belongs to the state legislatures. Nothing in the Constitution requires California to accept as truth the most advanced and

> sophisticated psychiatric opinion. It seems to be clear that it is not irrational, in our present state of knowledge, to consider that pronography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society. *In fact the very division of opinion on the subject counsels us to respect the choice made by the State. . . ."* 354 U.S. 501-502 (Warren, C.J., concurring). (Emphasis supplied).

By like token, the respective state legislatures are not required to accept the opinions of Petitioner's authorities and due to the fact that there exists an "empirical stalemate", this Court shoud respect the choice made by the legislative bodies that have seen fit to reinstate capital punishment.

> Whether the death penalty as a form of punishment for the commission of certain crimes is offensive to contemporary community standards is a legislative question.

Petitioner's last argument, and the one upon which he most heavily relies is *his* conclusion that the death penalty has been rejected by society because it violates the ". . . evolving standards of decency that mark the progress of a maturing society. . . ." *Trop v. Dulles*, supra, at 101. Aside from the fact that that opinion itself recognized the continued constitutional validity of the death penalty, Petitioner has failed to demonstrate that anything has transpired in the last thirteen years that has impugned the validity of the observation in 1958 that the death penalty ". . . in a day when it is still widely accepted . . . cannot be said to violate the constitutional concept of cruelty. . . ." *Trop v. Dulles*, at 99 (Warren, C. J., plurality opinion).

As evidence that the death penalty violates contempory standards of decency,

Petitioner includes the following: (i) a worldwide trend toward the disuse of the death penalty; (ii) the reflection in the scholarly literature of a progressive rejection of capital punishment founded essentially on moral opposition to such punishment; (iii) the decreasing number of executions over the last 40 years and especially over the last decade; (iv) the small number of death sentences rendered in relation to the number of cases in which they might have been imposed; and (v) the indication of public abhorence of the penalty reflected by the fact that executions are no longer public affairs.

This argument was thoroughly reputiated by Mr. Justice Powell in his concurring opinion at pages 437 through 442. Respondent can add little or nothing to Mr. Justice Powell's reply to the argument advanced by Petitioner except perhaps to note that sub-

sequent to the *Furman* decision, the People of California repudiated[2] the California Supreme Court's opinion rendered in *People v. Anderson*, Calif. 1972, 100 Cal. Rptr. 152, which held capital punishment, judged by contemporary community standards, was cruel and unusual, *People v. Anderson*, supra, at 167, and that there can be no suggestion that the legislation in question are relics of the past that have simply not been removed from the statutes books, 408 U.S. at 383 (Burger, C.J. dissenting opinion) for all 35 State statutes were re-enacted into law since 1972 as a result of *Furman v.*

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[2] On November 7, 1972, the People of California amended their constitution by an overwhelming majority of 67% (5,386,904 votes) so as to authorize capital punishment in that State. (See: Brief of California in Fowler v. North Carolina, at 37-38).

Georgia, supra. Respondent concurs with Mr. Justice Powell's conclusion that:

> One must conclude, contrary to petitioners' submission, that the indicators most likely to reflect the public's view--legislative bodies, state referenda and the juries which have the actual responsibility--do not support the contention that evolving standards of decency require total abolition of capital punishment. Indeed, the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery--not the core--of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function. . . ." 408 U.S. at 442-443 (Powell, J., dissenting opinion).

Mr. Justice Blackmun correctly observed that the elected representatives of the people are ". . . far more conscious of

the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity, than are we who sit cloistered on this Court. . ." 408 U.S. at 413 (Blackmun, J., dissenting opinion), and Respondent suggests the Chief Justice was eminently correct in his pronouncement that:

> ". . . *in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society.* This presumption can only be negated by unambiguous and compelling evidence of legislative default. . . ." 408 U.S. at 384 (Burger, C.J., dissenting opinion) (emphasis supplied).

This is the very premise upon which *Baker v. Carr*, supra, was decided. If the legislative judgments are not presumed to reflect the public will, then *Baker* means nothing and might just as well never been written. Of course, history tells us otherwise.

In this respect, Respondent would point out to this Court that a select-committee of the Florida Legislature, after hearing extensive testimony throughout the State, recommended that capital punishment be reinstated and the Florida Legislature responded overwhelmingly. The bill passed the Florida House of Representatives by a vote of 116-2 with one not voting (House Journal, State of Florida, pps. 51-52, December 1, 1972), and the Florida Senate by a vote of 36-1 with two not voting (Senate Journal, State of Florida, p. 40, December 1, 1972).

Respondent would be remiss if it did not respond to Petitioner's suggestion that the death penalty is applied disproportionately to racial minorities and the poor. (Pet. Br. at 136-137). Whether that was true in the past or not is not relevant to this case. In Florida as of January 1,

1976, of the 58 persons sentenced to death, 28 were white and 30 were black.[3] An examination of the case files in Respondent's custody reveals that in 39 of those, the defendant was represented by the public defender and 20 were represented by private practitioners.

To adopt the argument advanced by Petitioner, which is ". . . total abolition of capital punishment by judicial fiat. . ." 408 U.S. at 421 (Powell, J., dissenting opinion), would do utter violence to . . . stare decisus, federalism, judicial restraint

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[3] See Appendix A.

and--most importantly--separation of powers[4]. . ." 408 U.S. at 417 (Powell, J., dissenting opinion). Respondent suggests it would constitute a perversion of the democratic process.

Justices Burger, Blackmun, Powell, and Rehnquist in their dissenting opinions filed in *Furman v. Georgia* were of the view that whether capital punishment per se violated contemporary community standards decency and thus violative of the Eighth Amendment to the United States Constitution

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[4] Article III, Section 3, United States Constitution, provides that ". . . The Congress shall have power to declare the punishment of treason. . . ." A judicial conclusion that capital punishment is cruel and unusual would purport to deny to the Congress that body's power to determine the punishment for the crime of treason which is expressly given to Congress by the Constitution.

was a legislative question and not one to be decided by this Tribunal. Each Justice relied upon long-standing principles of this Court that decisions involving social policy and public morality are not judicial functions. As this Court said in *Robinson v. United States*, 324 U.S. 282 (1944):

> ". . . It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all. We do not know what provision of law, Constitutional or statutory, gives us power wholly to nullify the clearly expressed purpose of Congress to authorize the death penalty because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise." 324 U.S. at 287

Petitioner would have this Court deviate from those principles for he candidly admits:

> ". . . The moral character of this debate is as significant as its prevalence. The opposition to capital punishment--frequently voiced by religious denominations,

> among others--has been vigorously asserted on the basis of 'fundamental moral and societal values in our civilization and in our society.' Proponents of the death penalty have responded with equal moral fervor. Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument. . . ." Pet. Br. at pps. 118-119.

Respondent submits that what Mr. Justice White said in his dissenting opinion in *Roe v. Wade*, 410 U.S. 113 (1973), is equally relevant to the issue raised herein. Justice White said:

> ". . . I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. *The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of*

possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. *Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States.* In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. *This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs."* 410 U.S. at 221-222, (White, J., dissenting) (emphasis supplied).

See also: *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (White, J., dissenting opinion at 540-542).

Professor Mason in discussing the doctrine of judicial "self-restraint" advises against judicial intervention in cases such as this, stating:

> "'Self-restraint' is valuable chiefly as a warning signal. Courts enter on dangerous ground when they invade the domain of policy and, to justify their action, resort, wittingly or unwittingly, to political and social considerations, for which no support can be found in the Constitution. Unless the political process itself is under attack, the safer course is to rely on the legislature to declare public policy, and on political restraints to provide correctives. In America, adaptation of the Constitution to changed and changing conditions means, in considerable measure, the adaptation of judicial review. In a free society all governing institutions must ultimately respond to the dominant political forces of the country as revealed at the ballot box. 'In the long run,' Professor

> Corwin has observed, 'the majority is entitled to have its way, and *the run must not be too long either!'*
>
> Jefferson's admonition of 1821 is applicable generally--to the national government and the states, to Congress, Executive, and Court. The 'healing balm' of our Constitution, he said, is that 'each party should shrink from all approach to the line of demarcation, instead of rashly overleaping it, or throwing grapples ahead to haul to hereafter." *Mason*, supra, at 147-148.

Respondent respectfully submits that the history of the Eighth Amendment and judicial precedents are contrary to Petitioner's position; that the opinion of the People, as best evidenced through the acts of their elected representatives, is contrary to his position; and that this Court should in the exercise of judicial self-restraint decline to override the policy decision and moral judgment of the People that the death penalty for certain heinous crimes does not violate contem-

porary standards of decency, and therefore, does not offend the Constitution of the United States.

POINT II

CAPITAL PUNISHMENT MAY LAWFULLY BE IMPOSED UNDER FLORIDA'S CRIMINAL JUSTICE SYSTEM'S PRESENT PROCEDURES SAID PROCEDURES BEING EITHER REQUIRED OR PERMITTED BY THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF FLORIDA.

Shortly after this Court's opinion in the now well-known decision of *Furman v. Georgia*, supra, Florida's Legislature, obviously responding thereto, enacted Chapter 72-724, Laws of Florida, re-creating capital punishment in Florida. That law became effective on December 8, 1972.

Since that time, some 67 individuals are presently housed on death row in Florida's penitentiary at Raiford. An unknown number of others, whose penalties (originally death) having been reversed

by the Florida Supreme Court, are in some other form of state custody. In a surprising number of all the appeals from initial death judgments, arguments similar to those made here have been made by or on behalf of some of the defendants. The Florida Supreme Court has yet to write an opinion bearing thereon. So it is that although Florida's highest court has not spoken to the matter, they have surely had it put before them on more than a few occasions.

It is also interesting to note that at no time in Florida's history prior to either this Court's decision in *Furman v. Georgia*, supra, or the passage of Chapter 72-724, supra, was this argument ever presented to any court in Florida.

Petitioner contends the imposition of the death penalty in Florida, within its current criminal justice system, violates either the Eighth Amendment of the Constitution of the United States directly as cruel and unusual punishment (see argument *ante*), or tangentially the Fifth and Fourteenth Amendments (we would suppose upon a claim of an absence of due process) because:

(1) the prosecutor (in Florida the state attorney-see Chapter 27, Florida Statutes) has unbridled discretion with regard to the bringing of criminal charges;

(2) the jury has the unbridled right to return all verdicts from the most

severe (death) to the least severe (acquittal);

(3) there is unbridled discretion in the sentencing procedure pursuant to Florida's §921.141,Florida Statutes; and

(4) the ultimate in grace (executive clemency) is as well unbridled and therefore contributes to the constitutional infirmity.

Petitioner does not suggest that if this alleged unbridled discretion were removed such a system would either be desirable or optimum. That should not come as a surprise to anyone. Indeed, if that were the case, this nation would have stepped backwards into a judicial system not unlike that of the Medes and the Persians. Yet if his argument bears the ring of truth and proves

pursuasive, that is the only possible result for indeed if any discretion works the least untoward hardship on even one soul, it is as infirm as though it had done so to all. Thus, if it is properly excised only the absence of discretion can insure the absence of any excesses or deficiencies.

Even more to the point is the obvious fact that Petitioner does not discuss whether his complaint regarding the alleged infirmities in Florida's criminal justice system in capital cases is peculiar to those cases alone. It is well that he does not because even the most ordinary extrapolation of his complaint would of needs reveal quickly that the alleged infirmities in death cases is repeated many, many times

over in all criminal justice systems in all jurisdictions in all cases less than capital.

As we understand what is really a rather simple provision known as the Fifth Amendment to the Constitution of the United States, its only admonition (appropriate here) is that no person may be deprived of life, liberty or property without due process of law. Historically, America's courts have been so depriving people (hopefully) with due process of law--and well within the bounds of the very system Petitioner suggests is infirm when elevated to the level of death cases, for some 199 years. The upshot of all this is quite simply that if the Fifth Amendment to the United States Constitution makes no distinction regarding life, liberty or property, and carries as its only admonition that they shall not

be taken without due process, then surely the alleged failure of the system suggested by Petitioner with regard to his and, we suppose, other death cases, pervades the entire system. Indeed, is there anything that can be taken from a human other than his life, liberty or his property? Depending upon how pursuasive his argument may become when considered by this Court, it may safely be said that if it does not fall on deaf ears then the outlook for America's system of justice is decidedly grim.

Remembering that this Court's decision in the case of *McGautha v. California*, 402 U.S. 183, certainly admits that some discretion is quite permissibly a part of the process of determining who is to be executed, we wonder at why that sound

principle would not still obtain. Surely nothing written by this Court in *Furman v. Georgia*, supra, upset that conclusion in any way.

Terminally, we observe that none of the areas to be discussed *post* in this division of Respondent's brief regarding the certain levels of allegedly offensive discretion, had their birth in Florida legislative enactments that had anything to do with the question of capital punishment as it has recently developed in this Court. In short, state attorneys, juries, sentencing judges and chief executives were virtually always empowered to do the very things Petitioner suggests for the first time are infirm. With this in mind, your Respondent addresses the four areas of alleged discretion as

follows:

Prosecutorial Discretion

We are told by Petitioner that the initial infirmity stems from the fact that the prosecuting official in the state of Florida (State Attorney--see Chapter 27, Florida Statutes), some twenty (20) in number, has an unbridled right in selecting which cases should be placed upon trial, bargained out, pleas accepted to, *nolle prosequies* entered, and no charges filed. He points us to a host of authorities in support of these propositions. All of that is quite unnecessary since Respondent readily admits the latitude extended the several state attorneys. In this regard, there is not ten cents worth of difference between Florida's state attorneys' latitudes and those of the several United States

attorneys. See *United States v. Cox*, 342 F.2d 167 (C.A. 5), *cert.den. sub nom.; Cox v. Hauberg*, 381 U.S. 935; *In re. Grand Jury January, 1969*, 315 F.Supp. 662 (D.Md.)

Insofar as the matter applies to Petitioner's situation (the only one with which we should be concerned), we must insist that the state attorney has absolutely no control over whether a given individual in Florida is indicted for a capital crime.

Grand juries in Florida (Ch. 905, F.S.) are not required to rely upon the state attorney's conclusion regarding a capital case. They are free to investigate on their own any matters brought to their attention by anyone or, for the matter of that, about which they have or acquire personal informa-

tion. They may return an indictment without regard to the views of the state attorney and the court (circuit court) may not dispose of indictments so returned except as the result of assaulting pleadings by either of the parties. So it can be seen that it is not accurate to contend that the state attorney controls who shall be indicted for a capital crime in Florida. Remembering that he serves the grand jury as its legal adviser only if and when they want him to, it is difficult to imagine how he could prevent the return of an indictment for a capital crime.

Rather than assign to the several state attorneys any malicious control of the kind suggested by Petitioner, it must be assumed that those who are in fact indicted are those who should have been indicted, and

those who are not, of course, should not have been indicted. Unless and until there is any evidence whatsoever to show any pattern contrary to appropriate disposition, such speculation by Petitioner ought to merit nothing more than this Court's instant rejection.

We also agree that the prosecutor can terminate most, if not all prosecutions by the simple entry of an order *nolle prosequi*. We wonder at what it is Petitioner means to convey by this observation. The state attorney so doing has either done so appropriately or he lays himself bare to rejection by the electorate or removal by the governor. Unless we assume that state attorneys in Florida, and in particular the state attorney in

this cause (the Honorable E. J. Salcines), arbitrarily and capriciously sought the indictment against Petitioner, there seems little need to consider whether such results are philosophically possible. The simple fact that we must concede that human excesses or deficiencies are among us, does not in any sense of the word justify that as a compelling basis to conclude that the whole spectrum of Florida's prosecutorial imput is infirm under this Court's decision in *Furman v. Georgia*, supra.

Petitioner advises us that the state attorney may contract with a criminal for an exemption from prosecution, citing as authority therefor the case of *Ingram v. Prescott*, 111 Fla. 320, 149 So. 369 (Fla. 1933). He is accurate as to what the law used to be. Immunity from prosecution

today is a statutory creature which narrowly prescribes the circumstances in which it can and should be granted. See §914.04, Fla.Stat. Respondent does not mean to suggest that simply because it is now a creature controlled by statute that the grant or withholding of immunity cannot be abused but simply observes that what may have been a private arrangement at the time of the decision in the case of *Ingram*, supra, is now a rather public activity made the object of legislative control.

We are told that the state attorney is free to plea bargain and may therefore accept pleas to lesser offenses when it is appropriate. We would hope that plea bargaining is not removed from the scene of the criminal justice system. While it

may not be accurate that a full ninety (90%) percent of all criminal cases are disposed of in that fashion, it is certainly safe to say that more than seventy-five (75%) percent of them are. How wise that decision is turms upon a question of the wisdom of the several parties involved rather than on any suggestion of abuses or guile being practiced by the state attorney. In any case, all plea bargaining in Florida is done with the three principals involved. That is to say, the court, the state attorney and the defendant by and through his counsel who by virtue of this Court's decision in the case of *Gideon v. Wainwright*, 372 U.S. 335, 9 L.ed.2d 799, 83 S.Ct. 792, is vouchsafed to all defendants who may not be able to afford one. The presumption must follow that if a bargain has

been struck with regard to a plea, it is one which bears the imprimatur of legitimacy rather than the veil of evil. See Rule 3.171, Rules of Criminal Procedure, Vol. 33, F.S.A.

Petitioner seeks to make of plea bargaining something less than desirable by suggesting that the control exercised by the court is really unimportant since a defendant has a right to plead guilty. What he ought to tell this Court is that a defendant has a right to plead guilty only to the actual charge leveled against him by the indictment or information. His plea of guilty to any offense less than that must be one in which all three parties agree.

Petitioner next tells us that the state attorney may not actively seek the death penalty in a given case by (we suppose) not being aggressive enough during the sentencing procedure and perhaps never mentioning death itself as the ultimate sanction that he seeks. Undoubtedly this can occur without regard to whether Mr. Justice White in his special concurring opinion in *Furman v. Georgia*, supra, said so. Once again we ask why the presumption of skulduggery? Is Petitioner suggesting either that Mr. Salcines or other state attorneys in Florida have done so as to other capitally indicted defendants and not him; or is he simply saying because it conceivably could occur that his judgment must be set aside? We really do not know what he means by his remarks. What we do know is if he does not

mean the former, he ought not to be heard to complain about the latter.

Added to the above is the fact that state attorneys in Florida no longer enjoy unbridled discretion with regard to whether they file an information against someone charged less than capitally. This is so because the Florida Supreme Court in *In re. Rule 3.131(b), Florida Rules of Criminal Procedure*, 289 So.2d 3 (Fla. 1974), promulgated a rule which requires that each state attorney, before he signs an information, be certain that he can prove his case beyond and to the exclusion of every reasonable doubt. Accordingly, he is now restricted to the degree above discussed. It is of no consequence that the Rule does not apply to capital cases because the state attorney,

as we have discussed *ante*, does not file informations charging capital crimes. That comes only from a grand jury indictment.

Jury Discretion

We are next told that the jury has the unbridled right to return an ultimate verdict ranging all the way from death to acquittal. Obviously this would include the several conceivably possible verdicts of all lesser offenses embraced within the charge. This too seems to have been given some evil connotation by Petitioner. We wonder why since that is an infirmity which inheres in every criminal case ever tried in this country without regard to whether it may be capital or otherwise. If he is suggesting that by the latitude given the jury as the fact finder, they can upset the

criminal justice system by abusing their prerogatives, then indeed he indicts the entire jury system. Unless we are able to penetrate the minds of the several million juries which have undoubtedly sat through this nation's 199 years, there is no way to know that in fact this result has ever obtained. It well may be that it is prevalent. Your Respondent will not be as quick to speculate yea or nay as is Petitioner. Their area of discretion (in capital cases) is quite obviously open to the almost immediate review of the trial judge. That, in turn, is open to the review of the Supreme Court of the State of Florida during the appellate process. The Florida Supreme Court's decision is open to the review of this Court by Petition for Writ of Certiorari or any other appropriate pleading

in light of this Court's decision in *Furman v. Georgia*, supra. That seems to your Respondent a rather substantial barrier between the type of unbridled discretion perhaps properly condemned in *Furman* and an appropriate set of circumstances within which a death penalty may legitimately be imposed in this day and time.

Petitioner next complains that the distinction between felony murder at the first and second degree levels is, despite the opinion of the Supreme Court of Florida in the case of *State v. Dixon*, 283 So.2d 1 (Fla. 1973), indistinguishable. Why? The obvious difference between first and second degree murder is encompassed in the words appropriately quoted by Petitioner:

first degree "engaged in" -- and second degree "perpetration of". Without regard to whether one reads the dissenting opinion of Mr. Justice Boyd in *Dixon*, supra, or that of the majority, it is apparent that what the Legislature intended in that distinction is that the trigger man is the individual "engaged in" and should be tried as an individual having committed murder in the first degree, while the driver or look-out man, who was only involved in the "perpetration of" the felony which produced the murder, should not be treated as though he had committed first degree murder. Historically no thinking person would quarrel with the proposition that juries have always been reluctant to assess as much criminal responsibility against a mere look-out as they do against the physical perpetrator of

the felony killing. The Florida Legislature recognized this in writing their statute as they did, and the Florida Supreme Court acknowledged that it was the legislative intent and indeed is a valid distinction.

Petitioner seeks to counter this by suggesting that juries can convict for lesser offenses and thereby avoid the nice distinctions about which lawyers and judges speak. Once again we ask when have they not been able to do so even though the criminal charge was one founded upon basic English and in no wise complex?

Petitioner next tells us that the entire system suffers from yet another infirmity. That is to say that he can request instruc-

tions regarding lesser and included offenses even though there is no evidence thereof and by so doing secure in effect a jury pardon. As authority for this he refers to the cases of *Little v. State*, 206 So.2d 9, 10 (Fla. 1968); and *Bailey v. State*, 224 So.2d 296, 299 (Fla. 1969). In this regard Petitioner would have been accurate until the Florida Supreme Court rendered its decision in *Gilford, et al. v. State*, 313 So.2d 729 (Fla. 1975). That decision fully and finally put to bed the matter of securing charges with regard to offenses not traceable to any evidence presented in the cause by concluding "No evidence; no charge". That is no longer a viable complaint by any litigant in Florida if he means to suggest that the system suffers by a potantial hazard created thereby.

Even if this were not so, such a Rule would of necessity have to be an appropriate conclusion because to hold otherwise would be to permit anyone (at least in Florida) from requesting instructions on lesser offenses possibly included even though there is absolutely no evidence bearing thereon so as to permit a jury to return what would amount to an impossible verdict. This would surely fly into the teeth of the general principle condemned by this Court in *Furman v. Georgia*, supra.

Sentencing Discretion

Petitioner next complains that the sentencing procedure outlined by §921.141,F.S., is precious little, if indeed any, better than that which existed pre-*Furman v. Georgia*. He quotes rather extensively from a dissenting opinion of Mr. Justice Ervin

in *State v. Dixon*, supra. The sentencing procedure in Florida was designed with the hope of meeting the complaint of this tribunal in its decision in the case of *Furman v. Georgia*, supra. It would be foolish to suggest that the trial judge does not make the final determination as to life or death. Quite obviously he does. He is required, however, to state in a detailed writing the reasons for which he arrived at his conclusion of death as the appropriate sentence so that it, in turn, when measured by the Florida Supreme Court on appeal against all others capitally convicted as well as the evidence in the particular case can be properly assessed in order to determine whether it meets what some believe to be the test enunciated in *Furman v. Georgia*, supra.

In any case, we invite the Court's attention to the fact that both the jury and the judge in this case recommended Petitioner be sentenced to death. The Florida Supreme Court agreed that the posture of his sentence when measured against others and the general principles of *Furman v. Georgia*, supra, was a proper one. Ultimately, this Court must itself measure the decisions of the courts of last resort of the thirty-odd states which have retained capital punishment in determining whether the new aggregation is acceptably less discriminatory than it was at the time *Furman v. Georgia*, supra, was written.

We are told that the statute does not advise the trial judge what weight he is to give to the jury's recommendation. Truly

it does not, just as no legislation can tell a judge how he is to weigh matters within his exclusive pale. We do not suffer an invasion of the judiciary by the legislative branch. He says that because the jury is not required to write out its reasons for recommendation, the judge has nothing to which he can turn. How absurd. He has set with the jury through the entire sentencing proceeding and has heard it all. In this particular case, we are not confronted with an overriding of a recommendation of mercy, but rather unanimity as between the jury and the trial judge in concluding that death was the appropriate sentence. In this case not even one mitigating circumstance was found as opposed to four aggravating circumstances. What a fiction would have to be indulged in order for rational people to

conclude that this was a willy-nilly disposition either by the jury or the judge or the Florida Supreme Court. How much more must there be before complaints such as this will be quickly put aside as nothing more than a human who is dissatisfied with his plight?

It is true that different juries and different trial judges may produce different results based on similar evidence in th several cases across not only Florida but this nation.

With regard to Florida, the Florida Supreme Court is the terminal repository which must measure any such discrepancies as against the history of those theretofore sentenced. With regard to the nation at large, this Court is the ultimate repository which must make that

determination. An I B M type of computer result has never been persuasively argued as the appropriate grail of any criminal justice system. If it is, then we have no need for juries or judges, but rather a mechanical device by means of which facts can be fed in and retrieved quickly and uniformly without regard to those things by which we routinely function in the ordinary pursuit we call life. Mercy would not be a human grace nor would death be a human excess. They would simply be digits in a system. If this is the consummation Petitioner so devoutely wishes, then better minds than ours would have to put it together and provide for its implementation.

Petitioner finds yet another believed informity in the fact that appellate review is unguided by statutory restrictions such as would more nearly satisfy him.

We have never understood that what this Court said in *Furman v. Georgia*, supra, required any legislative attempt to write the impossible guidelines for the nation's judiciary. The Florida Supreme Court sits in the best position to determine from all its death cases what disposition should be made of incoming death cases so as to see that they square not only with each other in terms of severity or grace, but as well whether the aggregation would meet the test believed set by this Court in *Furman v. Georgia*, supra. More than that cannot be done and should not be expected.

Petitioner complains that this process does not take into account those defendants whose lives have been spared at the trial court level. We agree that it does not, yet we must urge that the presumption which must follow is that both the jury and the trial judge acted appropriately within legal bounds and returned not only a proper verdict but as well a proper sentence. To do otherwise would be to mix grapefruit with oranges on the theory that the Supreme Court of the State of Florida must review as well cases not within the jurisdiction (life sentences) only to see if by comparison the results in cases which are in their jurisdiction (death cases) are more nearly proper. That would necessarily require an assessment of impropriety against both the jury which returned the life recommendation and the

judge who agreed therewith. We do not consider that any comparison beyond that of all other death cases must be made in order to meet the basic tenants of regulated discretion seemingly approved by *Furman v. Georgia*, supra.

Executive Clemency

Petitioner now complains that executive clemency in Florida is as well legislatively unfettered and that because it is there is the possibility that the executive branch of Florida's government could arbitrarily bestow executive grace in the form of a pardon upon some capitally convicted defendants and not upon others.

Is Petitioner telling us that the Florida Cabinet, since this Court's decision in *Furman v. Georgia*, supra, has granted any

pardons to capitally convicted defendants arbitrarily and capriciously while withholding it from others? Is he even telling us that a pardon has ever been granted in the State of Florida by the executive branch of government to any capitally convicted defendant arbitrarily and capriciously while withholding the same from others arbitrarily and capriciously?

With the recent example of President Ford's pardon of former president Nixon as the best reminder of the fact that executive grace is unreviewable, we wonder what it is Petitioner means to say. If no one can review the President's grant of pardon to Mr. Nixon, then surely no criminal defendant in Florida or indeed the rest of the nation should enjoy a better position.

Petitioner refers to a twenty-five (25%) percent executive clemency rate found as a result of the study *Executive Clemency in Capital Cases*, 39 N.Y.U. L.Rev. 136, 191 (1964). Without regard to the accuracy of that writing, it is meaningless unless and until we determine that the executive branch of government cannot grant clemency without (1) said grant being subject to judicial review, and (2) without determining that the subjective basis upon which clemency may have been granted in Florida was arbitrary or capricious or both.

Having demonstrated that the positions advanced by Petitioner under this division of his argument, whether measured on *Furman's*

scale or that of any other rational thought process are lacking in any merit whatever, it follows the matter should be resolved favorably to your Respondent.

POINT III

SECTION 921.141, FLA.STAT., PRESCRIBING THE METHOD AND MEANS OF DETERMINING THE PENALTY TO BE IMPOSED IN A CAPITAL CASE, DOES NOT VIOLATE THE CONSTITITION OF THE UNITED STATES UNDER THE DECISION OF *FURMAN V. GEORGIA*, SUPRA.

In *Furman v. Georgia*, supra, this Court reversed the death sentences imposed upon William Furman and Lucious Jackson. This Court *did not* do so on the grounds that the death sentence was "cruel and unusual" *per se*, nor did it conclude that the death sentence was "cruel and unusual" as applied to the facts and circumstances of the cases then being considered. The Court's action was rather based upon the conclusion that "the system" itself was unconstitutional because it conferred upon the juries and/or judges the power to

arbitrarily and *indiscriminately* sentence a person to death or to life imprisonment and that experience demonstrated juries did so "whimsically and freakishly." The *system*, according to the majority of the Justices, allowed the fact finder to impermissibly discriminate against certain individuals and thus constituted a deprivation of equal protection implicit in the prohibition of the cruel and unusual punishment provision of the Fourteenth Amendment to the United States Constitution.

The "system" condemned, of course, was Georgia's statutory provision authorizing the jury to recommend mercy unaided by any instructions and not subject to judicial review in any way whatsoever. Florida's system was the same. *Thomas v. State,*

92 So.2d 621 (Fla. 1957); *State of Florida ex rel. Jimmie Lee Thomas v. Culver,* 253 F.2d. 507 (5th Cir. 1958); *Baker v. State,* 225 So.2d 327 (Fla. 1969). Moreover, the system was a unitary one meaning guilt and punishment was decided on evidence which was only admissible in determining guilt. *Craig v. State,* 179 So.2d 202 (Fla. 1965) *cert. den.,* 383 U.S. 959 (1966); and *Campbell v. State,* 227 So.2d 873 (Fla. 1969). This system prevented the jury from ever receiving information about the defendant which was obviously relevant to any intelligent disposition of the issue. *Williams v. New York,* 337 U.S. 241 (1949); *Craig v. State,* supra. It is not surprising that sentences determined under the "system" condemned by *Furman* produced *uninformed, irrational,* and freakish results. It is

respectfully submitted, however, that the arbitrary and irrational results are the results of the "system" by which they were determined rather than by the attitudes of the persons determining the sentences. The legal "system", was not a "system" at all! It had none of the attributes of a "system" designed to achieve any degree of uniformity. Indeed, the "system" was such that the ultimate question was presented to twelve citizens without any guidance whatsoever who were told that they and they alone could determine the question within their unbridled and unfettered discretion. Such a method is about as rational as submitting the issue of the defendant's *guilt* to a jury without instructing them as to applicable law and letting them wonder in utter speculation as to whether the accused

committed any "crime". Such was the system which was finally found wanting by this Court because it conferred upon juries and/or judges the power to indiscriminately sentence a person to death and *actual experience* has demonstrated contradictory sentences were returned in cases involving similar crimes.

In response to this judicial action, the Florida Legislature enacted §921.141, F.S., which materially altered the "system" by providing that the jury would recommend to the trial judge the sentence to be imposed. It further provides that a separate hearing be held wherein matters relevant, but inadmissible at the guilt stage of the trial, could be introduced. Ch. 72-724, §9, supra. This, of course, allows the receipt of evidence necessary to make an intelligent

decision on the subject. After hearing all of the evidence, the jury is required to render an advisory sentence to the trial judge based upon the existence of aggravating and mitigating circumstnces enumerated in §921.141, supra. (Pet.Br. 5,6,7) The trial judge is then required to consider and weigh the aggravating and mitigating circumstances and impose sentence notwithstanding the recommendation of a majority of the jury. §921.141(3), F.S. The judgment and sentence of death are then subject to automatic review by the Supreme Court of Florida, §921.141(4), F.S.

It is respectfully submitted that §921.141, supra, cannot be condemned on the basis of *Furman*, supra. It is also suggested that it must be upheld unless our entire system of criminal justice is to be

condemned and abandoned. This is true, notwithstanding the fact that the Legislature refused to eliminate the element of mercy in the imposition of punishment. It is obvious that the Legislature agreed with Mr. Justice Blackmun that such legislation would be "...regressive and of an antique mold...." 408 U.S. at 413 (Blackmun, Jr. dissenting) and refused to consider themselves presented with the extreme and inflexible alternatives, 33 L.ed.2d at 440, of no death penalty or a mandatory death penalty. This is undoubtedly true since even under a mandatory death penalty statute, jury nullification would still be possible. Moreover, Justice Burger in his dissenting opinion made it clear that other alternatives were available, 33 L.ed.2d at 442, for he said:

> "...Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed. . . ." 33 L.ed.2d at 442.

Of course, this is precisely what the Florida Legislature has done and in the absence of historical data demonstrating the new procedure ineffective or incapable of eliminating "freakish" results. Respondent is at a total loss as to just how the Petitioner could conclude that the newly created Florida system violates *Furman v. Georgia*, supra. It is submitted that this conclusion can only be predicated on a *presumption* that juries will not give obedience

to their oath and are incapable of applying instructions given to them by the court. Such an opinion is a terrible indictment of the American system of trial by jury and the citizens that are called upon to serve as jurors. More importantly, it is contrary to this Court's assessment of the character of the average jury. See: *Frazier v. Cupp*, 394 U.S. 731 (1960). Lastly, if the premise is true, then verdicts of guilt are infected with the same vice and the entire system of criminal justice is illegal and unconstitutional!

Certainly there will be cases where the results reached are contradictory, but that does not mean the system is unconstitutional. This is characteristic of our criminal justice system which has been

found acceptable. *Williams v. Illinois*, 399 U.S. 235, 243 (1970), citing *Williams v. New York*, supra. Absolute uniformity of punishment is not mandated for the obvious reason that it cannot be achieved by mere humans. It is childish foolishness to think that we can achieve perfection here on earth.

The Florida Legislature provided standards to guide the jury in making an informed decision and recommendation. We must presume application thereof will reduce the disparity of sentences unless and until there is *evidence* to the contrary, which is what this Court did in *Furman* itself. The Florida Legislature realizing that "...a proper sentencing decision calls on expertise which a jury cannot possibly be expected to bring with it to trial, nor

develop for the *one* occasion on which it will be used...." *A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures*, at p. 46, required the trial judge to impose the sentence, a clearly constitutional method of deciding the sentence to be imposed. *Williams v. New York*, supra. This provision alone will eliminate the possibility of different juries reaching different verdicts in criminal cases involving similar facts and circumstances, such as happened under the condemned "system". Appellate review by the Supreme Court of Florida will insure substantial equality of sentences to persons similarly situated. Indeed, this is why the American Bar Association, the Attorney General of the State of Florida,

and the Governor of the State of Florida have advocated appellate review of sentences in noncapital criminal cases.

It is respectfully urged that the Legislature has successfully met the challenge and has created a "system" which sufficiently limits the ability of juries and judges to arbitrarily and capriciously impose the supreme penalty, at least to the extent that this is *humanly* possible.

Petitioner attacks the due process application of the Fourteenth Amendment basically on the principle that the sentencing procedures of Florida permit the exercising of discretion by the trial judge and that the required appellate review of death sentences provided no meaningful protection from the arbitrary imposition of the death

penalty.

The term "discretion" in and of itself is not prohibited by due process. It is only when discretion is exercised in an arbitrary and capricious manner that gives rise to a due process violation. For as long as the discretion is exercised within rules and principles of law, discretion or reasoned judgment is as much a part of the judicial system of this country as the right to trial by jury.

That a trial judge may exercise his discretion in the imposition of the death penalty has been clearly faced by this Court in *Williams v. New York*, supra, and *Williams v. Oklahoma*, supra.

In *Williams v. New York*, supra, this Court in affirming the death sentence of a

trial judge, notwithstanding the jury's recommendation of a life sentence, and finding that a sentencing judge could exercise wide discretion in the source and type of evidence used to assist him in determining the extent of punishment to be imposed, said:

> "Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." 9[illegible] L.ed. 1337 at 1341

And this Court again in *Williams v. Oklahoma*, supra, turning to the concept of *Williams v. New York*, supra, said:

> "But we go on to consider this Court's opinion in Williams v. New York, 337 US 241, 93 Led 1337, 69 S Ct 1079. This Court there dealt with very similar contantions and held that, once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstnaces of the crime and to the convicted person's life and characteristics." 3 L.ed 2d 516 at 521

The Florida Supreme Court in *State v. Dixon*, supra, Florida's first case interpreting the new death penalty statutes, specifically held that that discretion of the trial judge in determining what evidence might be relevant to the sentence was not unbridled. *Dixon*, supra at 7.

The Florida Supreme Court imposing further restrictions on the discretion of the trial judge in imposing the sentence found that the requirement that the trial judge justify his sentence in writing, said:

> "The fourth step required by Fla. Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute." 283 So.2d 1 at 8

Interpretation of Language of Statute

Petitioner argues that the language utilized by the Florida Legislature in establishing guidelines to be used by

the trial court and the trial jury in determining the sentence to be imposed, used language that created uncertainty in the use of the words "heinous", "sufficient", "great", "many", "extreme", or "substantial"; and alleges further that it would be unrealistic to suggest that reasonable men would not or could not differ in an understanding of the language used.

In *State v. Dixon*, supra, the Florida Supreme Court went to great length in defining and establishing guidelines to be followed by the Florida trial courts in interpreting the language of the statute. (283 So.2d at 9).

This Court in upholding a death sentence imposed for the crime of kidnapping, where a petitioner for writ of certiorari attacked

the indefiniteness of the language used in *Robinson v. United States*, supra, said:

> "Nevertheless it is argued that the death penalty proviso should be held invalid on the ground that there is uncertainty as to the precise meaning and scope of the word 'unharmed' and the phrase 'liberated unharmed.' In most English words and phrases there lurk uncertainties. The language Congress used in this Act presents no exception to this general truth. One thing about this Act is not uncertain, and that is the clear purpose of Congress to authorize juries to recommend and judges to inflict the death penalty, *under certain circumstances*, for kidnappers who harmed their victims. . . ." [emphasis supplied]
> 89 L.ed. 944 at 947

Respondent submits that Petitioner's argument that the Florida statute, by its language, does not provide sufficient guidelines in determining the aggravating and

mitigating circumstances to be considered by the sentencing jury cannot now be given consideration by this Court as Justice Black said in *Robinson*, supra, "one thing about this act is not uncertain, and that is the clear purpose of Congress (Florida Legislature) to authorize juries to recommend and judges to inflict the death penalty under certain circumstances."

In following its original interpretation of the terms, as used in the statute, as established in *State v. Dixon*, supra, the Florida Supreme Court has reduced the death penalty imposed by the trial judge in five instances.[5] Each of these cases, with

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[5] *Slater v. State*, 316 So.2d 538; *Swan v. State*, 322 So.2d 485; *Halliwell v. State*, 323 So.2d 557; *Tedder v. State*, 322 So.2d 908; *Thompson v. State*, Case #35,107, 1/21/76, not yet reported.

the exception of *Slater v. State*, reduced the death penalty to life imprisonment upon a weighing of the aggravating and mitigating circumstances.

In *Dixon*, supra, the court said:

> ". . .Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." 283 So.2d 1 at 10.

In this Court's decision in *McGautha v. California*, supra, expressing the opinion of five members of the Court it was held that the absence of standards to guide the

jury's discretion in determining whether to impose or withhold the death penalty did not violate due process it was said:

> "Petitioners seek to avoid the impact of this history by the observation that jury sentencing discretion in capital cases was introduced as a mechanism for dispensing mercy--a means for dealing with the rare case in which the death penalty was thought to be unjustified. Now, they assert, the death penalty is imposed on far fewer than half the defendants found guilty of capital crimes. The state and federal legislatures which provide for jury discretion in capital sentencing have, it is said, implicitly determined that some--indeed, the greater portion--of those guilty of capital crimes should be permitted to live. But having made that determination, petitioners argue, they have stopped short--the legislatures have not only failed to provide a rational basis for distinguishing the one group from the other, cf. Skiller v. Oklahoma, 316 US 535, 86 L. Ed 1655, 62 S Ct 1110 (1942), but they have failed even to suggest any basis at all. What-

ever the merits of providing such a mechanism to take account of the unforeseeable case calling for mercy, as was the original purpose, petitioners contend the mechanism is constitutionally intolerable as a means of selecting the extraordinary cases calling for the death penalty, which is its present-day function.

"In our view, such force as this argument has derives largely from its generality. Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

* * *

"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or

death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete."

* * *

"Before we conclude this opinion, it is appropriate for us to make a broader observation than the issues raised by these cases strictly call for. It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial

> procedures that are best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. See Spencer v. Texas, 385 US 554, 17 L Ed 2d 606, 87 S Ct 648 (1967). The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected."
> 28 L.Ed.2d 711 at 724

Petitioner recognizes (Pt.Br. 56) that Art. V §3(b)(1) of the Florida Constitution requires that the Supreme Court of Florida *shall* hear appeals imposing the death penalty. Respondent is at a loss as to exactly what Petitioner complains of. Does Petitioner now contend that Florida's Constitutional provision, requiring State Supreme Court review of all death penalties to be unconstitutional under *Furman*.

Respondent thinks not. Does Petitioner then assert that all cases, involving at their outset capital punishment even though the final decision of these cases in the trial court do not reach that proportion, be reviewed *only* by the Supreme Court? Respondent thinks not. Certainly Petitioner does not intend to imply that all appellate review of criminal cases is not reported in the reporter system and available to all of the courts of Florida for their consideration in reaching subsequent appellate decisions both as to trial procedures and to penalty provisions. It would be facetious to argue to this Court that appellate counsel arguing a death sentence on appeal to the Supreme Court of Florida, would not include in his argument all cases determined by the Florida appellate courts,

whether it be the Supreme Court of the state or one of the state district courts of appeal, which would have any bearing, factually or in law on the then pending decision. Certainly appellate review must be had and is had.

The burden placed upon the Supreme Court of Florida by §921.141, supra, and the Florida Constitution requiring review of death penalties is best expressed and recognized by the Florida Supreme Court in its opinion in *Dixon*, supra, as previously quoted (283 So.2d 1 at 10), and Respondent submits that a close analysis of the nineteen opinions of the Supreme Court, spoken to by Petitioner (Pt. Br. 59) cannot be found lacking in explanation as to why the death penalty was either affirmed or reduced in that particular case.

Respondent respectfully submits that as Florida's death sentence statute matures with age that the reasoned judgments as reached in each particular case will solidify the boundaries within which the death penalty will either be affirmed or reduced.

Actual trial procedures as they exist in Florida--in the absence of the imposition of the death penalty--are first reviewable in the district courts of appeal and certainly Petitioner makes no assertions herein that such appellate procedure is not adequate. It is only the sentencing procedures--where death is imposed--of which he now complains. Final review of the death sentence required by §921.141, supra, has been found by the Florida Supreme Court in

Dixon, supra, to be an additional safeguard for those upon which the death penalty is imposed to assure that an unequal administration of justice does not occur. The Florida Supreme Court said:

> "Review of a sentence of death by this Court, provided by Fla.Stat. § 921.141,F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.
>
> "We also consider it reasonable to require that a finding that life imprisonment be imposed rather than death should be supported in writing by the trial judge. This we do require under our consitutional power to regulate practice and procedure in the courts. Fla.Const., art. V, § 2(a), F.S.A.

> "Cases involving life imprisonment would not be directly reviewable by this Court, and the District Courts of Appeal would not be empowered to overturn the trial judge on the issue of sentence. However, requiring these findings by the judge provides an additional safeguard for the defendant sentenced to death in that it provides a standard for life imprisonment against which to measure the standard for death established in the defendant's case, and again avoids the possibility of discriminatory sentences of death." 283 So.2d 1 at 8

It is in response to this Court's decision in *Furman*, supra, that Florida reinacted its death penalty statutes and has attempted to structure a sentencing procedure confined to reasoned judgment. If we are to believe that *McGautha v. California*, supra, correctly concluded that some discretion is permissible as a part of the state process of determining who is to be executed then Respondent

respectfully submits that the sentencing procedures of Florida now meet the constitutional requirements of due process.

Petitioner's claimed denial of due process, regarding the opportunity for reasoned judgment, does not make the imposition of the death penalty on him invariably cruel and unusual nor does he shoulder and carry the burden required of him herein that under Florida's death sentencing procedures that Petitioner has not received a punishment fitting the crime he committed.

CONCLUSION

The death penalty does not constitute cruel and unusual punishment per se and this is not altered by the fact that the criminal justice system contains procedures whereby the death penalty may be circumvented by the application of prosecutorial or executive judgment. The statutory procedures provided for by the Florida Legislature to be employed in determining whether a given individual should be sentenced to death is sufficient to remove the deficiencies found to exist by this Court in *Furman v. Georgia*, supra, so that the determination is now one of reasoned judgment rather unbridled discretion.

The facts and circumstances found to exist by the judge and jury when measured against the objective standards and

criteria enumerated in the statute are sufficient to support the judgment and sentence of death. Therefore, the decision of the Supreme Court of Florida upholding the judgment and sentence should be affirmed.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

A. S. JOHNSTON
Asst. Attorney Gen'l.

GEORGE R. GEORGIEFF
Asst. Attorney Gen'l.

RAYMOND L. MARKY
Asst. Attorney Gen'l.

The Capitol Building
Tallahassee, FL 32304

A P P E N D I X

STATE OF FLORIDA
DEPARTMENT OF OFFENDER REHABILITATION

FREQUENCIES ACCORDING TO RACE/SEX BY OFFENSE/SENTENCE
FOR ALL CAPITAL FELONY OFFENSE LAW OFFENDERS
AS OF JANUARY 1, 1976

		White Male	White Female	Black Male	Black Female	TOTAL
FIRST DEGREE MURDER	Life	83	2	70	1	156
	Death	26	0	29	0	55
RAPE	Life	11	0	14	0	25
	Death	2	0	1	0	3
	TOTAL	122	2	114	1	239

Compiled by:
Research & Statistics Section
Bureau of Planning, Research & Staff Development
February 20, 1976

Appendix A

IN THE CIRCUIT COURT, THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA	:	CASE NO 73-1397
VS:	:	DIVISION B
CHARLES WILLIAM PROFFITT	:	
	:	
	:	

ORDER TO DETERMINE MENTAL CONDITION OF DEFENDANT

This cause coming on to be heard before the Court on its own motion to determine the Defendant's mental conditions, it is thereupon, after due consideration,

ORDERED AND ADJUDGED that the Defendant, CHARLES WILLIAM PROFFITT, be examined by Dr. DANIEL J SPREHE, and Dr. ROBERT H COFFER, two disinterested qualified experts, to determine said Defendant's mental condition at this time and at the time of the offense 7/10/73, and to testify at a hearing as to HIS, mental condition on the 21st day of March A.D., 1974, at 9:00, AM.

DONE AND ORDERED on this 15th day of March A.D., 1974.

CHARGE: MURDER FIRST DEGREE
WRITTEN REPORT, MR. PLOWMAN, STATE ATTORNEY &
MR. LEVINSON, PUBLIC DEFENDER OFFICE

Walter P. Bennett Jr.
JUDGE OF THE CIRCUIT COURT OF
HILLSBOROUGH COUNTY, THIRTEENTH
JUDICIAL CIRCUIT, FLORIDA

FILED
James F. Tarpley, Clerk
Circuit Court

Appendix B

OBGBPg 13..

Court file

DANIEL J. SPREHE, M.D., P.A.
DIPLOMATE
AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY

March 18, 1974

SUITE 307
BAYSIDE BUILDING

PHONE 839-8339
2909 BAY TO BAY BOULEVARD
TAMPA, FLORIDA 33609

Honorable Walter N. Burnside, Jr.
Judge of the Circuit Court
Criminal Justice Division
Hillsborough County Courthouse
Tampa, Florida 33602

Re: Charles William Proffitt
Case No. 73-1397
Division B

Dear Judge Burnside:

Pursuant to your order I performed a psychiatric examination on Charles William Proffitt in the County Jail on March 17, 1974 from 8:05 p.m. to 9:05 p.m. Mr. Proffitt was verbal and cooperative in the interview. The usual type of psychiatric examination, consisting of taking a psychiatric history and performing ongoing mental status examination, was accomplished.

It is my opinion with reasonable medical certainty that Mr. Proffitt is currently able to understand his legal situation, is able to understand the charges against him and is able to assist counsel in the preparation of his defense. He is able to understand the gravity of his situation. In my opinion he is currently mentally competent.

It is also my opinion with reasonable medical certainty that on July 10, 1973 he was not suffering from any psychotic illness and was able to distinguish right from wrong. He had been drinking on that date but by his own account he was not really drunk and he knew that he wanted to kill someone. He also knew that he should try to hide this fact and try to run and evade the law immediately after the crime to which he readily admitted. The alcohol he did ingest was over a period of time from 7:30 p.m. to 4:30 a.m. but he doesn't remember the exact amount. He is aware that he could drive a car competently and he knew that it was a crime to kill and also knew it was a crime to enter someone's house when he entered the apartment where the crime was committed. He admits to a long standing compulsion to kill someone but this compulsion did not involve a break in reality testing and did not involve psychosis in that he always *knew* that murder was a crime and that he would be answerable for it. He has a long standing sociopathic personality characterized by resort to violence as a solution to his life problems and he has a rather chaotic life history with a lot of anti-social behavior including an Undesirable Discharge from the Armed Forces and numerous minor criminal convictions and other charges where he was *not* convicted. He had three rather chaotic marriages and has generally lived his life outside the usual standards of society.

Mr. Proffitt states that he believes he is capable of killing again, that his main reason for killing on this occasion was that he "just wanted to see what it would feel like." He makes it clear that he won't let his attorney put on any sort of mitigating witnesses to help in the decision regarding sentencing and that he fully understands the two possibilities open to him with regard to sentencing.

Sincerely,

Daniel J. Sprehe, M.D.

Daniel J. Sprehe, M. D.

cc: State Attorney
cc: Public Defender

DJS/vh

Appendix C

Court File

ROBERT H. COFFER, JR., M. D. P. A.
PSYCHIATRY
906 MEDICAL BUILDING
1 DAVIS BOULEVARD
TAMPA, FLORIDA

March 19, 1974

The Honorable Walter N. Burnside, Jr.
Judge of the Circuit Court
Hillsborough County Courthouse
Tampa, Florida

RE: Charles William Proffitt
Case No. 73-1397

Dear Judge Burnside:

I examined the above-named 28 year old man at the Hillsborough County Jail on March 18, 1974 in accordance with your order. A clinical, diagnostical, psychiatric interview was conducted which lasted 50 minutes.

As a result of this examination it is my opinion that he is competent at this time; that he does understand and comprehend the result of the trial which has already been completed. Further, within bounds of reasonable medical certainty, it is my opinion that he was mentally competent on July 10, 1973, and able to distinguish right from wrong at that time.

Sincerely,

Robert H. Coffer, Jr., M. D.

RHC:be

Appendix D